

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ALLEN MATHIS,

Defendant-Appellant.

UNPUBLISHED

May 22, 2008

No. 275655

Wayne Circuit Court

LC No. 06-010964-01

Before: Owens, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of felonious assault, MCL 750.82, felon in possession a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was acquitted of two counts of assault with intent to rob while armed, MCL 750.89. He was sentenced, as a fourth-offense habitual offender, MCL 769.12, to four to 20 years in prison for each felonious assault conviction, four to 20 years in prison for the felon in possession conviction, four to 15 years in prison for the carrying a concealed weapon conviction, and two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's codefendant, Mercedes Smoot, was charged with two counts of assault with intent to rob while armed, MCL 750.89, and two alternative counts of felonious assault, MCL 750.82. Smoot waived her right to a jury trial. The trial court granted Smoot's motion for a directed verdict at the close of the prosecutor's presentation of evidence. Afterward, Smoot testified as a witness on defendant's behalf.

Defendant's first argument on appeal is that because the case against Smoot was dismissed after a motion for a directed verdict, the trial court erred when it gave the jury an "accomplice testimony" instruction with regard to Smoot. We disagree.

"A trial court's decision whether to give an accomplice instruction is reviewed for an abuse of discretion." *People v McGhee*, 268 Mich App 600, 608; 709 NW2d 595 (2005). Moreover, this Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). "Instructions that are somewhat imperfect are acceptable, as long as they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant." *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996).

“The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court.” *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). Additionally, accomplice credibility is a jury question. *Id.* Because an “accomplice may have a special interest in testifying . . . the testimony is suspect and must be received only with great care and caution.” *Id.* A jury instruction regarding a “disputed accomplice” – such as that given in the instant case – is appropriate where there is a factual dispute concerning whether the witness “took part in the crimes that [the] defendant was charged with committing” See *Perry, supra* at 527-529. An accomplice instruction may be especially appropriate in cases involving closely drawn credibility contests. *Heikkinen, supra* at 328, 337.

In this case, the trial court instructed the jury using a modified version of CJI2d 5.5 and 5.6, stating:

Before you may consider what Mercedes Smoot said in court, you must decide whether she took part in the alleged crime that the defendant is charged with committing. Ms. Smoot has not admitted to taking part in the crime, but there is evidence that could lead you to think that she did.

A person who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice. When you think about Ms. Smoot’s testimony, first decide if she was an accomplice. If, after thinking about all of the evidence, you decide that she did not take part in this crime, judge her testimony as you judge that of any other witness.

But if you decide that Ms. Smoot was an accomplice, then you must consider her testimony in the following way: You should examine her testimony closely and be very careful about accepting it. You may think about whether the accomplice’s testimony is supported by other evidence because then it may be more reliable.

However, there is nothing wrong with using an accomplice as a witness. When you decide whether to believe an accomplice, consider the following: Was the accomplice’s testimony falsely slanted to make the defendant seem not guilty because of the accomplice’s own interests, bias or for some other reason?

In general, you should consider an accomplice’s testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base an acquittal or conviction on it.

There is evidence in the lower court record that Smoot knowingly and willingly helped or cooperated with defendant in committing crimes against Stephen Babb and Maria Sanders. Smoot drove defendant to the scene of the crimes at least once.¹ Furthermore, around the time of

¹ Babb and Sanders identified Smoot as the driver during defendant’s first trip to the gas station where the crimes occurred, even though testimony from Jackeline Harrington, Daryl Sawyer, and
(continued...)

the crimes, she only drove away from the gas station after defendant's repeated prompts, and she searched the neighborhood for defendant afterward. Nevertheless, Smoot never admitted to encouraging or helping with the crimes. Additionally, she testified that she did not see defendant with a gun. Finally, the trial court granted Smoot's motion for a directed verdict in the case against her, finding that the prosecutor did not present evidence of concert of action beyond a reasonable doubt.

There was a factual dispute concerning whether Smoot knowingly and willingly helped or cooperated with defendant in the crimes. Therefore, we conclude that the trial court did not abuse its discretion in instructing the jury to consider whether Smoot was an accomplice and to examine her testimony closely if they determined that she was.

Defendant's second argument on appeal is that he was denied effective assistance of counsel when his attorney failed to move to suppress the on-scene identifications made by Babb and Sanders. Defendant claims that the circumstances surrounding the identifications were unduly suggestive. We disagree.

Because there was no evidentiary hearing below with regard to defendant's ineffective assistance claim, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The court must first find the facts and then decide whether those facts constituted a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* at 484-485.

A prompt on-scene identification allows the police to immediately decide whether a "suspect [is] connected with the crime . . . or merely an unfortunate victim of circumstances." *People v Libbett*, 251 Mich App 353, 363; 650 NW2d 407 (2002) (internal citation and quotation marks omitted). Indeed, on-scene identifications are sometimes indispensable in order to determine whether a subject should be released from police custody. *Id.* at 361-362. They also allow victims to make identifications when their memories are fresh. *Id.* at 362. However, an identification procedure "violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998) (footnote omitted). An identification procedure "is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The following factors are relevant to determine the likelihood of misidentification: (1) the opportunity for the witness to view the suspect at the time the crime occurred; (2) the witness's degree of attention; (3) the accuracy of any prior descriptions by the witness; (4) the witness's level of certainty during the

(...continued)

Smoot suggests that Harrington was that driver. Smoot admitted that she drove defendant on his second trip to the gas station.

identification; and (5) the length of time between the crime and the confrontation. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998).

Considering the totality of the circumstances, Babb's and Sanders's on-scene identifications of defendant were not based on an impermissibly suggestive procedure leading to a substantial likelihood of misidentification. First, Babb and Sanders observed both of defendant's trips to the gas station. The gas station was well-lit, so when he passed Babb's car they could see his face clearly. Furthermore, their attention was drawn to defendant on his first trip because he spoke angrily to a man selling compact discs. On defendant's second trip, defendant exited a car thirty feet from Babb's car, held a gun, and said, "talk that s--t now." Then, defendant approached Babb's car, held the gun three inches from Babb's head, and demanded money. Thus, Babb and Sanders had adequate an opportunity to view defendant at the time the crime occurred. *Colon, supra* at 305. Second, because Babb and Sanders felt threatened by defendant, their attention was piqued. *Id.* Third, Babb's and Sanders's initial descriptions of defendant accurately described his appearance and clothing, which he wore when he was detained. *Id.* Fourth, Babb and Sanders immediately recognized defendant in the squad car and there is no evidence on the record that they expressed uncertainty. *Id.* Finally, because the police responded to the report of the assault, detained defendant, and executed the on-scene identification within minutes, the length of time between the crime and the confrontation was minimal. *Id.* Under these circumstances, Babb's and Sanders's on-scene identifications of defendant did not violate defendant's right to due process of law. *Gray, supra* at 111.

Michigan has adopted the ineffective assistance of counsel standard established by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Grant, supra* at 485. Effective assistance is strongly presumed, and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id.*, p 485; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, (2) that this performance likely affected the outcome of the trial, and (3) that the proceedings were fundamentally unfair or unreliable. *Grant, supra* at 485-486; *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Here, defendant's attorney's performance did not fall below an objective standard of reasonableness. Indeed, counsel is not required to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Because the on-scene identifications were not impermissibly suggestive, a motion to suppress would have been futile.

Defendant lastly argues that the gun admitted at trial was irrelevant and consequently inadmissible. Because defendant's trial counsel explicitly stated on the record that he had no objection to the admission of this evidence, this issue is waived and any error has been extinguished. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Defendant claims that he was denied the effective assistance of counsel because his trial counsel failed to object to the admission of the abandoned gun into evidence. However, defendant did not include this claim in his Statement of Questions Presented. Therefore, it is not properly before this Court. See MCR 7.212(C)(5), and *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). At any rate, the ineffective assistance claim is without merit because we conclude that any objection by defense counsel would have been futile. *Ackerman, supra* at 455. The recovery of an abandoned gun in the neighborhood of the assault several days

after the crime made the charges against defendant more likely. The jurors properly were allowed to assess the proper weight to be afforded to the gun.

Affirmed.

/s/ Donald S. Owens

/s/ Patrick M. Meter

/s/ Bill Schuette